

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

STATE OF TEXAS, *et al.*,

Plaintiffs,

V.

Case No. 1:18-CV-68

UNITED STATES OF AMERICA, *et al.*,

Defendants,

KARLA PEREZ, *et al.*,

Defendant-Intervenors,

and

STATE OF NEW JERSEY,

Proposed Defendant-Intervenor.

DECLARATION OF
KENNETH S. LEVINE

I, Kenneth S. Levine, hereby make the following declaration with respect to the above-captioned matter.

1. I am a Deputy Attorney General for the New Jersey Attorney General's Office and one of the counsel of record for Defendant-Intervenor State of New Jersey in this matter.

2. Attached as **Exhibit A** hereto is a true and correct copy of an email exchange between me and counsel for the Federal Defendants.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and complete to the best of my knowledge.

Executed this 21st day of November 2018.

/s/ Kenneth S. Levine

Kenneth S. Levine

Exhibit A

From: [Robins, Jeffrey \(CIV\)](#)
To: [Nina Perales](#); [Kenneth Levine](#)
Cc: [Starr, Brantley](#); [Biggs, Adam](#); [Bitter, Adam](#); [Disher, Todd](#); [Glenn Moramarco](#); [Jeremy Hollander](#); [Rachel Wainer Apter](#)
Subject: [EXTERNAL] RE: DACA: Federal Defendants' Answer (DKT 332)
Date: Friday, October 19, 2018 3:18:52 PM

Ken,

Federal Defendants will oppose your motion. Defendant Intervenors have no cognizable interest in the answer here. In fact, concerns about notice pleading referenced in the cases you cite are not an issue here, as all the Defendant Intervenors have filed answers in accordance with Rule 24. Additionally, Federal Defendants note that of the limited case law in this area, the cases you have cited are based on faulty analysis and conflict with other provisions of the Federal Rules. Finally, the relief you seek is not warranted, and Federal Defendants should be permitted leave to re-plead should the court agree with you.

Sincerely,

Jeff Robins

Jeffrey S. Robins
Assistant Director
Office of Immigration Litigation
District Court Section
(202) 616-1246

From: Nina Perales [mailto:nperales@MALDEF.org]
Sent: Thursday, October 18, 2018 4:42 PM
To: Kenneth Levine <Kenneth.Levine@law.njoag.gov>
Cc: Robins, Jeffrey (CIV) <jerobins@CIV.USDOJ.GOV>; Starr, Brantley <Brantley.Starr@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Glenn Moramarco <Glenn.Moramarco@law.njoag.gov>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov>; Rachel Wainer Apter <Rachel.Apter@njcivilrights.gov>
Subject: Re: DACA: Federal Defendants' Answer (DKT 332)

Ken, the Perez Defendant Intervenors do not oppose the motion.

Sent from my iPad

On Oct 18, 2018, at 2:39 PM, Kenneth Levine <Kenneth.Levine@law.njoag.gov> wrote:

Dear Counsel:

Regarding the issues I raised below with respect to the Federal Defendants' answer, presently New Jersey's deadline to move to strike or, in the

alternative, to compel the Federal Defendants to replead their answer is Monday, October 22.

Accordingly, in case such a motion is necessary, and in order to comply with Judge Hanen's certificate of conference rules, can you please let me know by Monday, October 22, at noon EST your position on such a motion.

Thank you.

Best,

Ken

Kenneth S. Levine | Deputy Attorney General
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Division of Law | Government & Healthcare Fraud Section
124 Halsey St. | Newark, NJ 07101
Telephone: 973-648-2881
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From: Kenneth Levine
Sent: Wednesday, October 17, 2018 10:17 AM
To: 'Robins, Jeffrey (CIV)'
Cc: 'Starr, Brantley'; 'Biggs, Adam'; 'Nina Perales'; 'Bitter, Adam'; Glenn Moramarco; Jeremy Hollander; Rachel Wainer Apter; 'Celina Moreno'; 'Disher, Todd'
Subject: DACA: Federal Defendants' Answer (DKT 332)

Jeff –

I write concerning the answer to the Amended Complaint that the Federal Defendants filed on October 1 (Dkt. 332).

Federal Rule of Civil Procedure 8(b) only allows three responses in an answer: (i) admit an allegation, (ii) deny an allegation, or (iii) aver a lack of sufficient knowledge to admit or deny. But instead of admitting, denying, or averring a lack of knowledge, Federal Defendants respond to 211 of the 356 allegations in the Amended Complaint by stating only that the allegations contain “legal conclusions,” “questions of law to be determined solely by the Court,” or similar formulations “to which no response is necessary.”

More specifically, for 168 of the allegations, the Federal Defendants respond that the cited paragraph “consist[] of Plaintiffs’ characterizations of the lawsuit and related legal conclusions, to which no response is required” or

“contain[]Plaintiffs’ characterization of their claim and legal conclusions to which no response is necessary”:

Paragraphs 9, 10, 11, 12, 16, 28, 29, 30, 31, 32, 33, 34, 35, 47, 48, 61, 62, 63, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 81, 85, 87, 89, 90, 91, 97, 98, 100, 101, 102, 103, 104, 105, 107, 108, 111, 113, 114, 115, 116, 123, 128, 133, 134, 135, 140, 141, 142, 150, 156, 174, 189, 193, 194, 195, 196, 197, 198, 199, 208, 209, 210, 211, 215, 217, 218, 221, 225, 226, 229, 230, 231, 232, 233, 234, 235, 236, 240, 241, 244, 246, 270, 271, 272, 274, 275, 276, 277, 279, 281, 282, 283, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 352, 354, and 356

And for an additional 43 allegations, the Federal Defendants respond that the allegations in the Amended Complaint contain “jurisdictional allegations that present legal conclusions and questions of law to be determined solely by the Court, and to which no response is necessary”:

Paragraphs 17, 18, 19, 21, 22, 219, 220, 221, 222, 223, 224, 237, 238, 239, 242, 245, 247, 248, 249, 250, 251, 252, 253, 254, 255, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 278, 280, 284, 285, 286, and 305

These are not proper responses. *See Bruce v. Anthem Ins. Companies, Inc.*, No. 3:15-CV-0353-D, 2015 WL 1860002, at *2 (N.D. Tex. Apr. 23, 2015) (“insufficient” under Rule 8(b) to respond to allegations “on the basis that it is a ‘legal conclusion.’”), *citing Lane v. Page*, 272 F.R.D. 581, 602 (D.N.M. 2011) (“Responses that . . . allegations are legal conclusions do not comply with rule 8(b)’s requirements”); *see also Kegerise v. Susquehanna Township School Dist.*, No. 1:CV-14-0747, 2016 WL 407348, at *3 (M.D. Pa. Feb. 3, 2016) (“Rule 8(b) does not permit a party to refuse to respond to an allegation by asserting it is a conclusion of law.”) (ordering defendants to replead answer); *Certain Underwriters at Lloyd’s v. SSDD, LLC*, No. 4:13-CV-193, 2013 WL 6801832, at *4 (E.D. Mo. Dec. 23, 2013) (“[Defendant’s] answer that it need not respond to ‘legal conclusions’ finds no support in the language of Rule 8(b), which requires a response to all allegations.”) (striking answers that violated Rule 8(b), with leave to replead).

New Jersey reserves all rights with respect to the deficient answers, including (but not limited to) moving to strike under Rule 12(f), and deeming the deficient answers admitted under Rule 8(b)(6).

New Jersey would not object to the Federal Defendants filing an amended answer to correct the pleading errors.

Please let us know by Friday, October 19, at 5:00 p.m. EST, how you would like to proceed.

Best,

Ken

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